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12 JAYNES CORPORATION

13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF NEVADA

15 JAYNES CORPORATION, a New Mexico) CASE NO. 2:10-cv-00764-MMD-GWF
16 Corporation doing business in Nevada,)
17 Plaintiff,) STIPULATED MOTION TO STRIKE AND
18 vs.) VACATE ORDER (DOC. # 57) PURSUANT
19 AMERICAN SAFETY INDEMNITY) TO CONDITIONAL SETTLEMENT
COMPANY, licensed to do business in the) BETWEEN JAYNES CORPORATION
20 State of Nevada; NEVADA CONTRACTORS) AND AMERICAN SAFETY INDEMNITY
INSURANCE COMPANY, INC., licensed to) COMPANY
21 do business in the State of Nevada; and DOES)
1-10, inclusive,)
22 Defendants.)
23 _____)

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1 Defendant/Appellant AMERICAN SAFETY INDEMNITY COMPANY (ASIC), by and
 2 through its attorney of record, the McKay Law Firm, Chtd., and Plaintiff/Appellee JAYNES
 3 CORPORATION (Jaynes), by and through its attorney of record, Morris Polich & Purdy LLP,
 4 hereby submit a Stipulated Motion to Strike and Vacate the Order (Doc. #57) on the parties'
 5 Cross-Motions for Summary Judgment (Doc. #29 and 38.)

6 I. PROCEDURAL BACKGROUND

7 On May 24, 2010, Jaynes filed a complaint against ASIC and Nevada Contractors
 8 Insurance Company (NCIC) in this court, wherein Jaynes sought declaratory relief and damages
 9 for an alleged breach of contract claim. (Doc. # 1.)

10 After being served with the summons and complaint, ASIC answered the complaint.
 11 (Doc. # 17.)

12 Jaynes alleged it qualifies as an additional insured to the commercial general liability
 13 policies ASIC issued to its named insured. The parties filed Cross-Motions for Summary
 14 Judgment regarding the issue of a duty to defend. (Doc. # 29 and 38.)

15 On December 26, 2012, the Court issued an Order granting Jaynes' Motion, and denying
 16 ASIC's Motion. (Doc. #57.)

17 Thereafter, Jaynes filed a second motion for summary judgment regarding the amount of
 18 damages. (Doc. # 59.) The Court denied the second motion. (Doc. # 77.)

19 On April 1, 2014, the Court conducted a bench trial, and thereafter issued a Bench Order.
 20 (Doc. # 135.) On April 28, 2014, the court entered a judgment pursuant to the Bench Order.
 21 (Doc. #136.)

22 On May 23, 2014, AISC filed a Notice of Appeal. (Doc. #145.) Pursuant to the 9th
 23 Circuit's Mediation Program, the parties participated in a mediation wherein they conditionally
 24 resolved the dispute on appeal.

25 The proposed settlement is subject to the Court granting this stipulated Motion to Strike
 26 and Vacate the Order on the parties' Cross-Motions for Summary Judgment (Doc. # 57), which
 27 forms part of the issues on appeal. If this stipulated Motion is not granted, the appeal will be
 28 reinstated.

1 On November 20, 2014, the parties filed a stipulated motion to voluntarily dismiss the
 2 appeal without prejudice subject to reinstatement. (Doc. #158.)

3 On November 26, 2014, the 9th Circuit Court of Appeals issued an Order and Mandate to
 4 Dismiss the Appeal without Prejudice subject to Reinstatement for the purpose of the parties
 5 filing a stipulated Motion to Strike and Vacate the Order (Doc. # 57) on the parties' Cross-
 6 Motions for Summary Judgment in District Court, which forms a part of the Settlement
 7 Agreement between the parties.

8 On December 1, 2014, the District Court issued an Order on the records of the District
 9 Court regarding the 9th Circuit Court of Appeals Order and Mandate Dismissing the Appeal
 10 without Prejudice subject to Reinstatement. (Doc. #160.)

11 The parties, therefore, submit the instant Stipulated Motion to Strike and Vacate the
 12 Order (Doc. #57) on the parties' Cross-Motions for Summary Judgment (Doc. #29 and 38).

13 II. LAW AND LEGAL ARGUMENT

14 A. Federal Rule of Civil Procedure 54

15 Federal Rule of Civil Procedure 54(b) governs non-final judgments, including
 16 "any order or other decision, however designated, that adjudicates fewer than all the claims or
 17 the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b).

18 Under Rule 54(b), the court has wide latitude to revise prior orders and an order "may be
 19 revised at any time before the entry of a judgment . . ." Fed. R. Civ. P. 54(b).

20 In the Ninth Circuit, a district court may vacate a judgment following settlement upon
 21 consideration of "the consequences and attendant hardships of dismissal or refusal to dismiss and
 22 the competing values of finality of judgment and right to re-litigation of unreviewed disputes."
 23 *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998) (quotation marks
 24 omitted). No such inquiry is required under Rule 54(b).

25 Under Rule 54(b), district courts have "complete power" over non-final orders and may
 26 vacate or revise them "at any time," if doing so would be "consonant with equity." *United States*
Gypsum Co. v. Pac. Award Metals, Inc., No. C 04-04941 JSW, 2006 WL 1825705, at *1 (N.D.
 27 Cal. July 3, 2006); *De la O v. Arnold-Williams*, No. CV-04-0192-EFS, 2008 WL 4192033, at *1
 28 (E.D. Wash. Aug. 27, 2008) (quotation marks omitted).

1 Courts that exercise Rule 54(b) power in the context of settlement have found vacating a
 2 prior order is “consonant with equity” if there are no reasons suggesting the order should not be
 3 vacated.

4 For example, in *United States Gypsum*, a district court in the Northern District of
 5 California vacated several orders under Rule 54(b), including a summary judgment order and a
 6 claims construction order, to facilitate settlement. (*United States Gypsum*, 2006 WL 1825705, at
 7 *1.) The court in that case required only that the agreement to vacate “was a significant factor in
 8 successfully resolving this litigation,” and that there were “no considerations that would justify
 9 denial of the motion.” *Id.*

10 Likewise, in *De la O*, the court considered factors such as (1) whether all parties have
 11 agreed to vacate the order as a condition of the proposed settlement; (2) whether a former party
 12 to the action would be adversely affected by vacating the order; and (3) whether the costs of
 13 continuing the action with uncertain results are outweighed by the benefits of the proposed
 14 settlement. (*De la O*, 2008 WL 4192033, at *1.)

15 In this case, none of these considerations suggest denying the Stipulated Motion to strike
 16 and vacate is appropriate. First, a condition to settling the dispute between the parties is the court
 17 granting this motion; hence, the stipulated motion. The proposed resolution also conserves
 18 judicial resources in several respects, including not addressing the issues on appeal, and those
 19 that remain at the district court.

20 There is no suggestion that any former party to the case would be adversely affected by
 21 striking and vacating the Order since the Order at-issue is specific to ASIC, and not NCIC.
 22 Rather, the parties negotiated a resolution of this appeal that is conditioned on the court granting
 23 this Stipulated Motion. Therefore, the parties submit granting the Stipulated Motion pursuant to
 24 Rule 54 is proper.

25 B. Federal Rule of Civil Procedure 60

26 Federal Rule of Civil Procedure Rule 60 also provides this Court with authority to
 27 strike and vacate the Order on the Cross-Motions for Summary Judgment pursuant to a material
 28 term to a proposed settlement of this case.

1 In particular, Rule 60(b)(6) provides that a Court may set aside a final judgment or ruling
 2 for “any other reason that justifies relief” as the interests of justice require. *See In Re*
 3 *International Fibercom, Inc.*, 503 F.3d 933, 940 (9th Cir. 2007) (Rule 60(b)(6) “should be
 4 liberally applied” to “accomplish justice”).

5 The decision to vacate an order is addressed to the sound discretion of the district court
 6 and gives the court a grand reservoir of equitable power to do justice in a particular case. FRCP
 7 60(b), 28 U.S.C.A; *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) (applying Washington
 8 law) (decision to vacate reviewed under broad abuse of discretion standard).

9 Here, to facilitate a conditional settlement, and as an express term in their negotiated
 10 settlement agreement, Jaynes and ASIC agreed that ASIC will file the instant Stipulated Motion
 11 to strike and vacate the Court’s December 26, 2012 Order (Doc. #57). On similar facts, courts
 12 have upheld this request.

13 In *Novell, Inc. v. Network Trade Center*, 187 FRD 657, 660 (D. Utah 1999), the parties to
 14 a trademark infringement dispute reached a settlement predicated on partial vacatur of the district
 15 court’s prior rulings, leaving the remainder of the rulings intact and petitioned the court for a
 16 partial vacatur pursuant to FRCP 60(b)(5). *Id.* at 659.

17 The *Novell* court, noting the parties had good reason to seek vacatur, and that settlement,
 18 including vacatur, presented a simple and inexpensive way to accommodate both parties’
 19 interests, approved the motion and, as requested, vacated some but not all its prior rulings. *Id.* at
 20 661. *See also, Lycos v. Blockbuster*, 2010 WL 5437226 (D. Mass. 2010) (partial vacatur
 21 approved where settlement contingent on court’s granting party’s unopposed motion to vacate).

22 Here, the parties agreed as a condition to settlement that ASIC would seek vacatur of the
 23 Court’s December 26, 2012 Order pursuant to the instant Stipulated Motion.

24 While the settlement agreement between the parties is anticipated to relieve the parties of
 25 any further obligations in this case, ASIC seeks the instant relief due to the continuing, citable
 26 nature of the prior Order, which may detrimentally impact ASIC in other, future cases.

27 Because the parties are willing to resolve the case and forego the appeal, ASIC believes
 28 the requested relief is justified to promote compromise and avoid expensive appeals. By striking

1 and vacating the Order, ASIC obtains the recompense it desires from the resolution and it not
2 compelled to continue to litigate on appeal.

3 The strong public policies of encouraging settlement and conserving judicial resources
4 apply here; the parties submit no reason exists for the Court to not grant this Stipulated Motion.

5 **III. CONCLUSION**

6 The parties request the Court strike and vacate the Order on the Cross-Motions for
7 Summary Judgment, which is a condition to a successful settlement of this action. If the
8 Stipulated Motion is not granted, the appeal will be reinstated with the appellate court for all
9 purposes.

10 **McKAY LAW FIRM, CHTD.**

11 DATED: December 2, 2014

12 By:

13 */s/ Pamela McKay*

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19 **MORRIS POLICH & PURDY LLP**

20 DATED: December 2, 2014

21 By:

22 */s/ Nicholas Wieczorek*

23

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